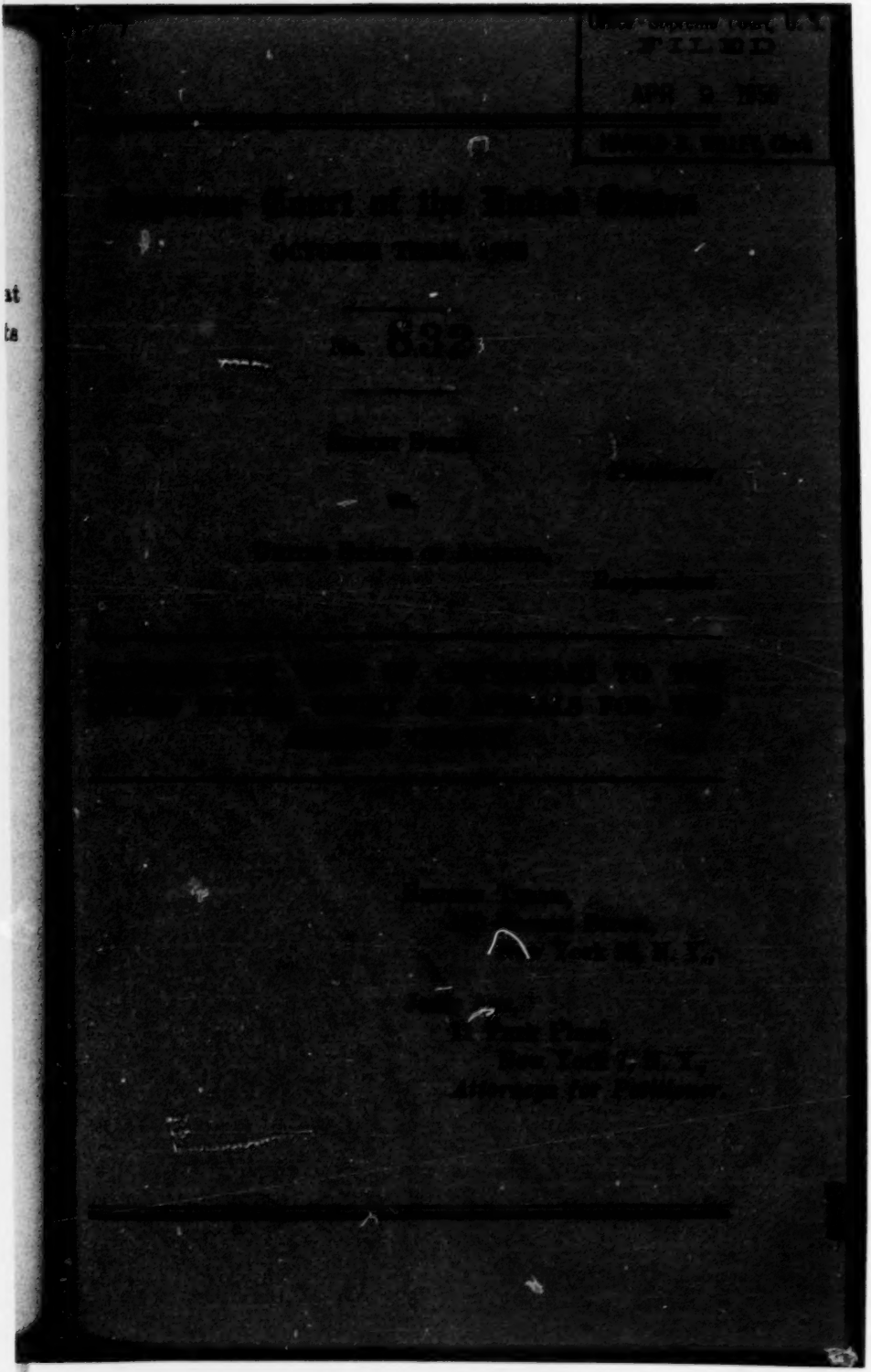

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

SIDNEY STEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner seeks a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit which by a unanimous court modified an order of the United States District Court for the Southern District of New York. Petitioner was produced before the United States District Court for the Southern District of New York on a writ of habeas corpus ad prosequendum on May 25, 1955. The district court set bail in the sum of $50,000. Thereafter a motion was made to reduce this bail to the sum of $1,000. This motion was denied, and an appeal from that order denying a reduction of the bail was taken to the United States Court of Appeals for the Second Circuit. On March 9, 1956, by unanimous court, the order of the district court was modified by reducing the bail from

$50,000 to $30,000. It is respectfully submitted that the sum of $30,000 is excessive and in contravention of the petitioner's constitutional rights.

Opinions Below

The district court wrote an opinion denying the petitioner's motion to reduce bail. This opinion of Judge Herlands is set forth in full in the appendix herewith submitted. The Circuit Court of Appeals wrote a per curiam opinion which is also set forth in full in the appendix herein.

Jurisdiction

The order sought to be reviewed was dated and entered on March 9, 1956. This Court's jurisdiction to review the order and question by writ of certiorari is conferred by Title 28, U. S. Code, Sec. 1254, and by this Court's decision and opinion in *Stack* v. *Boyle*, 342 U. S. 1.

Questions Presented for Review

1. Did the United States Circuit Court of Appeals for the Second Circuit, in fixing bail at $30,000 require excessive bail, in violation of the Eighth Amendment of the United States Constitution?

2. Did the United States Court of Appeals for the Second Circuit, in requiring $30,000 bail, violate Rule 46, Federal Rules of Criminal Procedure covering petitioner's right to bail and the amount thereof, before conviction?

3. Did the United States Court of Appeals for the Second Circuit err in not further reducing bail of the petitioner before conviction?

Constitutional Provisions and Rules Involved

The Eighth Amendment to the Constitution of the United States, which provides in part:

"Excessive bail shall not be required • • •."

Rule 46, Federal Rules of Criminal Procedure, which provides in part:

"Rule 46, Bail

(a) Right to Bail.

(1) Before conviction. A person arrested for an offense not punishable by death shall be admitted to bail • • •."

• • • • • • •

(c) Amount. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."

Statement of the Case

The defendant, together with others, was indicted in June, 1951 on a charge of conspiracy to violate the Smith Act. This indictment was returned by a Grand Jury of the United States District Court for the Southern District of New York. The defendant was apprehended in August 1953 at Twain Harte, California.

The defendant, after his apprehension in California, was indicted by a Grand Jury of the United States District Court for the Northern District of California on a charge of being an accessory after the fact, and on a charge of

conspiracy. These charges stemmed from the fact that at the time the defendant was apprehended he was in the company of one Robert G. Thompson, who had been convicted of conspiracy to violate the Smith Act in the United States District Court for the Southern District of New York. Thompson, after his conviction, fled and thereby forfeited bail in the amount of $20,000.

The defendant was admitted to bail in the United States District Court for the Northern District of California in the amount of $35,000 on the charges pending against him in the California District, and $1,000 on the charges pending against him in the New York District, making a total bail of $36,000. The defendant made bail and was enlarged, pending the trial in the California District Court.

On April 26, 1954, defendant was convicted in the United States District Court for the Northern District of California on both counts of the indictment, and received a sentence of three years, which he is now serving.

In January, 1956 the Court of Appeals for the Ninth Circuit affirmed his conviction.

In the latter part of May, 1955, the defendant was brought to New York for trial on the indictment returned against him in 1951 for conspiracy to violate the Smith Act. Bail was set for the defendant on the New York charge in the amount of $50,000.

On or about August 15, 1955 a motion was made to reduce the bail of $50,000 set in the District Court for the Southern District of New York on the charge of conspiracy to violate the Smith Act.

This motion was denied and an appeal from the order denying the motion was taken to the United States Court of Appeals for the Second Circuit. On March 9, 1956 the Circuit Court of Appeals modified the order of the district court by reducing the bail from $50,000 to $30,000.

The petitioner is presently confined to the Federal Detention Headquarters in New York City where he is serving his sentence imposed upon him by the United States District Court for the Northern District of California. This sentence will have been served on September 19, 1956.

The petitioner resides with his wife and two infant sons at 1161 Shakespeare Avenue, Bronx, N. Y. The family is completely without resources, the only income being approximately $55 per week which his wife earns, and recently his older son, having graduated from High School, obtained a position at a salary of approximately $40 per week. It becomes apparent that it is well nigh impossible to raise a sum such as $30,000 from the resources of his family. It is possible however, to borrow from friends and relatives approximately $10,000 to $15,000.

While awaiting trial in California, at a time when there were two indictments outstanding against him, and at a time when the petitioner faced a maximum of fifteen years imprisonment, he was enlarged for a period of more than three months on a total bail of $36,000. During this period, he always made himself available to the mandates of the court, and appeared for his sentencing in California when ordered to do so.

After his conviction in California, bail was set for the petitioner in the amount of $75,000 pending his appeal. Since he was unable to raise such a sum of money, the petitioner elected to serve his sentence pending his appeal. He is presently serving this three year sentence, although his appeal is still in the courts.

It is therefore apparent that this petitioner, facing only a maximum sentence now of five years, would respond to the mandates of any court if released in reasonable bail.

Reasons for Allowance of Writ

The bail of $30,000 set by the Circuit Court of Appeals is excessive, and while lower than that set by the district court, is still an abuse of discretion and violative of the Eighth Amendment to the Constitution of the United States.

Under Rule 46(c) of the Federal Rules of Criminal Procedure the amount of bail must be such as "will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."

The petitioner has shown by his past conduct while admitted to bail that he will submit to the mandates of the court.

The presumption of innocence remains with the petitioner until his guilt is proven beyond every reasonable doubt. The law does not contemplate that a defendant shall be compelled to spend a long period in jail before and during his trial through the requirement of excessive bail.

The mere fact of indictment for conspiracy to violate the Smith Act cannot justify the excessive bail required herein. The decision below is contrary to this court's decision and opinion in *Stack* v. *Boyle*, 342 U. S. 1. The question of the violation of the petitioner's right to reasonable bail under the Eighth Amendment is of great significance. It calls for review by this Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Second Circuit, commanding that court to certify and send to this court for its review and de-

termination, a full and complete transcript of the proceedings of that court herein, being the case numbered and entitled in its docket as "United States of America, plaintiff-appellee v. Sidney Stein, defendant-appellant," and that the order of that court be reviewed by this court, and for such other and further relief as may be just and proper.

Dated: New York, N. Y.,
April 5, 1956.

Respectfully submitted,

REUBEN TERRIS,
150 Nassau Street,
New York 38, N. Y.,

JOHN ABT,
11 Park Place,
New York 7, N. Y.,
Attorneys for Petitioner.

APPENDIX

Per Curiam Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 288—October Term, 1955.
(Argued March 6, 1956 Decided March 9, 1956.)
Docket No. 23925

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SIDNEY STEIN,
Defendant-Appellant.

Before:

CLARK, *Chief Judge*, and GALSTON, *District Judge*.

Appeal from the United States District Court for the Southern District of New York, William B. Herlands, *Judge*.

Sidney Stein appeals from the denial, D. C. S. D. N. Y., 18 F. R. D. 248, of his motion to reduce bail set at $50,000 on his arrest on an indictment charging him and twenty other persons with conspiracy to violate the Smith Act, 18 U. S. C. (1940 Ed.) § 11, 18 U. S. C. (1946 Ed.) § 2385. Modified; bail reduced to $30,000.

See also *United States* v. *Stein*, D. C. S. D. N. Y., 18 F. R. D. 17.

THOMAS B. GILCHRIST, JR., Chief Asst. U. S. Atty. for Southern Dist. of N. Y., New York City (PAUL W. WILLIAMS, U. S. Atty., and MORTON S. ROBSON, Asst. U. S. Atty., New York City, on the brief), for plaintiff-appellee.

REUBEN TERRIS, New York City, for defendant-appellant.

PER CURIAM:

The defendant was a fugitive for over two years, with widespread newspaper publicity concerning his flight; when apprehended in 1953 he was harboring one Robert G. Thompson, a fugitive from a Smith Act conviction. Obviously he is not the best of risks for bail, as the able opinion of Judge Herlands shows. D. C. S. D. N. Y., 18 F. R. D. 248. But there seem, if anything, special reasons for evenhanded justice in these Smith Act prosecutions, see *Stack* v. *Boyle*, 342 U. S. 1, 5, 6, 9, 10; and we should not go beyond normal bounds,[1] as we really feel the very high bail of $50,000 here set and continued does. After his apprehension in 1953, the United States District Court for the Northern District of California released him in bail of $35,000 upon charges growing out of his harboring of Thompson and $1,000 on the charges pending here; being thereafter convicted he duly surrendered and has since been serving his prison sentence. 18 F. R. D. 248, 249; and see also *United States* v. *Stein*, D. C. S. D. N. Y., 18 F. R. D. 17, 20, 21. He appears to be without financial resources, and his wife works at a small wage to support their two children. We think the ends of justice and public policy will be better served if the bail is reduced to $30,000. Accordingly we so order.

Modified; bail reduced to $30,000.

---

[1] See instances cited in *United States* v. *Noto*, 2 Cir., 226 F. 2d 953, 955, and by Mr. Justice Harlan in proceedings for bail in the same case, where he set bail at $10,000, instead of the $30,000 set below.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Constitutional provisions and rules involved	2
Statement	2
Argument	5
Conclusion	7

CITATIONS

Cases:	
Bary v. *United States*, 348 U. S. 908	5
Spector v. *United States*, 193 F. 2d 1002	5
Stack v. *Boyle*, 342 U. S. 1	4, 5
United States v. *Flynn*, 216 F. 2d 354, certiorari denied, 348 U. S. 909	6
United States v. *Kremen*, 114 F. Supp. 899; 18 F. R. D. 17 (S. D. N. Y.); No. 23925 (C. A. 2); No. 14,359 (C. A. 9)	7
United States v. *Thompson*, 214 F. 2d 545, certiorari denied, 348 U. S. 841	2
Constitution of the United States:	
Eighth Amendment	2
Statutes:	
Smith Act of 1940, 54 Stat. 670, 18 U. S. C. 2385	2
18 U. S. C. §§ 3, 371	3
Miscellaneous:	
Federal Rules of Criminal Procedure:	
Rule 46 (a) (2)	5
46 (c)	5

283898—56

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 832

SIDNEY STEIN

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 18 F. R. D. 248. The opinion of the Court of Appeals (Pet. App. 9–10) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1956 (Pet. App. 1). The petition for a writ of certiorari was filed on April 9, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Is the amount of bail as fixed by the Court of Appeals excessive, in violation of the Eighth

Amendment, or of petitioner's right to pre-trial bail under Rule 46 (c) of the Federal Rules of Criminal Procedure?

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The constitutional provisions and the rule involved are set forth in the petition (Pet. 3).

STATEMENT

The petitioner, together with 20 others, was indicted on June 19, 1951, by a grand jury in the Southern District of New York, and charged with conspiracy to violate the Smith Act, 54 Stat. 670, 18 U. S. C. 2385. Seventeen of the persons charged in this indictment were apprehended shortly thereafter. Thirteen of petitioner's co-defendants in that case were convicted after a widely publicized trial on January 21, 1953. Petitioner, however, and three others charged in the indictment could not be apprehended at that time. Despite intensive efforts on the part of the Federal Bureau of Investigation, petitioner was not located until August 27, 1953. On that date he was apprehended in the Sierra Nevada mountains near the small village of Twain Harte, California, together with Robert G. Thompson and three others. Thompson was a convicted Smith Act defendant, who had been admitted to bail and who had fled rather than surrender to serve his sentence, thereby forfeiting $20,000 bail.[1]

[1] Thompson was convicted of criminal contempt and sentenced to a term of four years, *United States v. Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841.

When petitioner was apprehended by the Federal Bureau of Investigation, he had grown a mustache and lost much weight in an obvious attempt to alter his appearance. Furthermore, he carried no identification bearing his true name. Instead, he was using an alias and possessed elaborate documentary indicia of a fabricated biography.

After his apprehension in California, petitioner and three other persons were charged as accessories after the fact, in that knowing Thompson to be a fugitive, they did receive, relieve, comfort and visit him "in order to hinder [and] prevent his apprehension * * * [and] punishment"; they were also charged with conspiring to carry out this offense, in violation of 18 U. S. C. §§ 3, 371.[2] Petitioner was convicted in the District Court for the Northern District of California, Southern Division, and was sentenced to three years in prison. Bail pending his appeal was set in the amount of $75,000.[3] When he could not post the required bail he began serving his prison sentence, pending his appeal. Service of the term will have been completed on or about September 19, 1956. The Court of Appeals for the Ninth Circuit, on January 20, 1956, affirmed this conviction. *Kremen* v. *United States,* No. 14,359. At the

[2] The remaining defendants were also indicted and convicted for harboring petitioner and conspiracy to harbor him.

[3] Chief Justice Warren, on July 9, 1954, denied an application to reduce that bail.

present time a motion for rehearing in that case is pending before the Court of Appeals for the Ninth Circuit.

Petitioner was returned to the Southern District of New York on May 25, 1955, pursuant to a writ of *habeas corpus ad prosequendum* to stand trial on the Smith Act conspiracy charge. After a hearing in accordance with the procedure outlined in *Stack* v. *Boyle,* 342 U. S. 1, the court set bail in the amount of $50,000 and later denied a motion for reduction of this bail. On appeal from the denial of this motion, the Court of Appeals reduced the bail to $30,000.

Petitioner recently made application to Mr. Justice Douglas to reduce the $75,000 bail on the harboring charge. At the same time, he applied to Mr. Justice Harlan for reduction of the $30,000 bail on the Smith Act charge. The Government suggested a reduction from $75,000 bail to $45,000 on the harboring charge, and this reduction was ordered by Mr. Justice Douglas on April 18, 1956. Mr. Justice Harlan refused to disturb the amount of bail set by the Court of Appeals for the Second Circuit and, on April 17, 1956, denied petitioner's application for reduction of his $30,000 bail.

The present petition asks for review of the $30,000 bail set by the Court of Appeals and seeks reduction to an undetermined amount, not to exceed $15,000.

ARGUMENT

Subsection (c) of Rule 46 of the Federal Rules of Criminal Procedure states that the amount of bail "shall be such as in the judgment of the * * * court * * * will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."[4] The dominant clause of this provision is that "the amount shall be such as in the judgment of the * * * court * * * will insure the presence of the defendant * * *". While the court must consider the other elements mentioned in this portion of the Rule in exercising its discretion, the assurance of the defendant's presence is of paramount importance. This factor was emphasized in *Stack* v. *Boyle,* 342 U. S. 1, 4–5: "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. *Ex parte Milburn,* 9 Pet. 704, 710, (1835)." See also *Spector* v. *United* States, 193 F. 2d 1002, 1005 (C. A. 9).

Particularly in the light of this factor, bail of $30,000 is not excessive in petitioner's case. In *Bary* v. *United States,* 348 U. S. 908, the Court denied an application for a reduction of bail and a peti-

[4] The amendment of Rule 46 (a) (2) which was announced on April 9, 1956, does not affect these provisions of subsection (c).

tion for certiorari on the issue of bail before trial. The defendants in that case, like petitioner, were charged with conspiracy to violate the Smith Act. Unlike petitioner, however, those defendants had never been fugitives, but were readily available when sought after their indictment, and were never known to have associated with, or traveled in the company of, a known convicted fugitive from justice. One defendant in that case was held for bail in the amount of $30,000 and another in the amount of $25,000. Bail for the remaining defendants was set at amounts ranging from $5,000 to $15,000.

The persons charged as petitioner's co-conspirators and tried in the case of *United States* v. *Flynn,* 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909, were held in $25,000 bail before trial. At present, the co-defendants who were fugitives at the time of the original indictment are at liberty on bail in the amount of $20,000. These others, although they were fugitives, did surrender voluntarily, and so far as is indicated by the record, never lived or traveled in the company of a convicted fugitive. Furthermore, several of the persons indicted under the "membership" provision of the Smith Act have been held in bail comparable to the amount set for the petitioner, *e. g.,* Claude Lightfoot—$30,000; Junius Scales—$35,000; Emanuel Blumberg—$20,000.

Petitioner has been found to be a fugitive from justice by two District Courts and two Courts of Appeals (see *United States* v. *Kremen,* 114 F. Supp. 899, 905 (N. D. Cal.); 18 F. R. D. 17, 21 (S. D. N. Y.); No. 23925 (C. A. 2); No. 14,359 (C. A. 9). His presence at trial will not be assured unless bail is set at an amount commensurate with the proven risk involved in releasing him. The flight to avoid arrest and the later apprehension in the company of a convicted fugitive (who had forfeited the sum of $20,000 bail pending appeal), as well as the efforts to assume a false identity in order to avoid apprehension, show that "adequate assurance" in petitioner's case will not be given by any lesser sum than that set by the court below.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WILLIAM F. TOMPKINS,
Assistant Attorney General.
HAROLD D. KOFFSKY,
JOHN F. LALLY,
CARL G. COBEN,
Attorneys.

MAY 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

No. 832

Office - Supreme Court, U. S.
FILED
APR 9 1956
HAROLD B. WILLEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

SIDNEY STEIN,
Defendant-Appellant.

APPELLANT'S BRIEF AND APPENDIX

REUBEN TERRIS,
Attorney for Appellant,
Office & P. O. Address,
150 Nassau Street,
New York City.

INDEX

STATEMENT 1

POINT I—The defendant is entitled to reasonable bail under the Eighth Amendment to the Constitution of the United States 3

POINT II—Bail before conviction must be only in an amount sufficient to guarantee the appearance of the defendant for trial 5

CONCLUSION 7

TABLE OF CASES CITED

Noto v. U. S., Decision No. 371 Misc., decided on November 21, 1955 5

Rubinstein v. Mulcahy, 155 Fed. 2nd 1002 5

Stack v. Boyle, 342 U. S. 1 ..... 3, 4

U. S. v. Lawrence, 4 Cranch 518 6

U. S. v. Motlow, 10 Fed. 2nd 657 4

STATUTE CITED

United States Constitution, Eighth Amendment 3, 4

INDEX TO APPENDIX

Docket Entries 1a

Opinion of Herlands, D.J. 2a

Order Denying Motion to Reduce Bail 7a

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. SIDNEY STEIN, Defendant-Appellant.	Case Number C 136-7

APPELLANT'S BRIEF

Statement

This is an appeal by the defendant, Sidney Stein, from two orders of Hon. William B. Herlands.

The defendant, together with others, was indicted in June, 1951 on a charge of conspiracy to violate the Smith Act. This indictment was returned by a Grand Jury of the United States District Court for the Southern District of New York. The defendant was apprehended in August 1953 at Twain Harte, California.

The defendant, after his apprehension in California, was indicted by a Grand Jury of the United States District Court for the Northern District of California on a charge of being an accessory after the fact, and on a charge of conspiracy. These charges stemmed from the fact that at the time the defendant was apprehended he was in the company of one Robert G. Thompson, who had been convicted of conspiracy to violate the Smith Act in the United States District Court for the Southern District of New York. Thompson, after his conviction, fled and thereby forfeited bail in the amount of $20,000.

The defendant was admitted to bail in the United States District Court for the Northern District of California in the amount of $35,000 on the charges pending against him in the California District, and $1,000 on the charges pending against him in the New York District, making a total bail of $36,000. The defendant made bail and was enlarged, pending the trial in the California District Court.

On April 26, 1954, defendant was convicted in the United States District Court for the Northern District of California on both counts of the indictment, and received a sentence of three years, which he is now serving.

In January, 1956 the Court of Appeals for the Ninth Circuit affirmed his conviction.

The appeal from the order herein denying the writ of habeas corpus is therefore moot and is withdrawn.

In the latter part of May, 1955 the defendant was brought to New York for trial on the indictment returned against him in 1951 for conspiracy to violate the Smith Act. Bail was set for the defendant on the New York charge in the amount of $50,000.

On or about August 15, 1955 a motion was made to reduce the bail of $50,000 set in the District Court for the Southern District of New York on the charge of conspiracy to violate the Smith Act. The appeal from this order is presently the only one before this Court.

The appellant claims error in that the District Judge improperly applied the law to the facts in that he denied the defendant-appellant his constitutional right to reasonable bail prior to conviction.

POINT I

The defendant is entitled to reasonable bail under the Eighth Amendment to the Constitution of the United States.

It requires no wordy statements or citation of precedents to prove that this defendant or any defendant in a criminal case is entitled to reasonable bail before conviction. As to what constitutes reasonable bail, an examination of some of the authorities may prove helpful.

In *Stack* v. *Boyle,* 342 U. S. 1, we have a similar situation to the case at bar. There 12 defendants were indicted on precisely the same charge as the instant defendant-appellant. The trial court set pre-trial bail at $50,000 each and this determination was upheld by the Ninth Circuit Court of Appeals. Chief Justice Vinson, on page 4 of his opinion said,

> "From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See Hudson v. Parker, 156 U. S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."

Speaking further, on page 5 of his opinion, Chief Justice Vinson said,

> "Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an

> accused. *Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.*" (Emphasis supplied.)

In the *Stack* v. *Boyle* case (supra) the Supreme Court sent the matter back to the District Court for a hearing to determine what amount would constitute reasonable bail. The District Court set the sum of $10,000 as bail for each of the defendants in that case.

The appellant has affirmatively shown that he can not raise any such amount as $50,000 bail (Rec. pp. 4, 52). This claim of the appellant has not in any way been refuted by the Government. He is completely without resources, and the only income to his family comes from the meager salary of his wife who is employed. She earns $55 per week which is used to maintain herself and the two children of the marriage.

Under these circumstances, pre-conviction bail of $50,000 deprives this appellant of his rights under the Eighth Amendment to the Constitution of the United States.

In *U. S.* v. *Motlow,* 10 Fed. 2nd 657, Mr. Justice Butler sitting as Circuit Justice said, page 659,

> "As to bail. The Eighth Amendment provides that 'excessive bail shall not be required.' This implies, and therefore safeguards, the right to give bail at least before trial. *The purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it can not be given.*" (Emphasis supplied.)

In the instant case, fixing the amount of bail at $50,000 is in effect a denial of bail. It is a figure hopelessly out of proportion with the punishment of the offense, if convicted, and an invasion of his constitutional right to reasonable bail. The imposition of this huge bail makes a mockery of the Eighth Amendment to the Constitution of the United States.

POINT II

Bail before conviction must be only in an amount sufficient to guarantee the appearance of the defendant for trial.

In determining what amount of bail is reasonable, the court must examine the punishment for the offense charged, if convicted, and examine the amounts of bail set on other defendants faced with similar punishment.

By statute, the maximum penalty for the alleged crime charged to the appellant herein is 5 years imprisonment and a fine of $10,000.

In *Noto* v. *U. S.*, Decision No. 371 Misc., decided on November 21, 1955, for which the citation is not yet available, Justice Harlan, sitting as a Circuit Justice fixed pre-trial bail for the defendant at $10,000. In that case, the defendant was indicted under the "membership" section of the Smith Act. Punishment for this is a maximum of 10 years imprisonment and $10,000 fine. Here too, the defendant was alleged to have been a fugitive, and bail was set by the District Court in the sum of $30,000. This amount was affirmed by this Court. Nevertheless, bail was reduced to the sum of $10,000.

In *Rubinstein* v. *Mulcahy*, 155 Fed. 2nd 1002, this very court said on page 1004,

> "• • • The purpose of bail before trial is to insure the presence of the accused when required without the hardship of incarceration before guilt has been proved and while the presumption of innocence is to be given effect. The reasonableness of the amount is to be determined by properly striking a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary restraint before conviction under the circumstances surrounding each particular accused."

While waiting trial on both indictments, the appellant was enlarged on a total bail of $36,000.

There is every likelihood that if the appellant were bailed, he would appear in court when required. At the time that he was admitted to bail, he still faced possible conviction on both the West Coast indictment and on the East Coast indictment. Having comported himself properly under bail before, there is no reason to assume that facing less punishment than before, he will now depart the jurisdiction of the court.

His fellow defendants have been admitted to bail in amounts ranging from $5,000 to $7,500 (Rec. p. 3). Since the denial of the appellant's motion to reduce bail, three other co-defendants voluntarily surrendered to plead to the indictment. Each of these defendants had been sought by the Government since the return of the instant indictment. Bail for these three co-defendants was set in the sum of $20,000 each.

Under these circumstances, bail for the appellant in the sum of $50,000 is unconscionable.

Further, a search of the records in the various courts shows that bail for the same charge as the appellant faces was fixed for other defendants in amounts ranging from $2,000 to $25,000. Over two-thirds of the more than one hundred defendants were released before trial in bail ranging in amounts from $5,000 to $10,000. The average of bail in all Smith Act cases similar to the instant case is $9,000.

In *U. S.* v. *Lawrence*, 4 Cranch 518, the Court said:

> "• • • to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law."

It is clear from the foregoing authority, and all the facts and circumstances in this case, that the sum of $50,000 bail here is prohibitive, excessive and illegal.

CONCLUSION

The order of the District Court should be modified to the extent that a reasonable sum shall be set as bail for the defendant-appellant herein.

Respectfully submitted,

REUBEN TERRIS,
Attorney for Defendant-Appellant.